



Delaware Nutrient Management



The Delaware Nutrient Management Commission Minutes of the Full Commission Meeting Held September 18, 2007

In attendance:

| <i>Commission Members Present</i> | <i>Others Present</i> | | |
|-----------------------------------|----------------------------|---------------|-------------|
| D. Baker – Vice Chairman | L. Beharry | J. Foltz | S. Kepfer |
| R. Baldwin | M. Brown | K. Foskey | S. Peterman |
| K. Blessing | R. Coleman | T. Garrahan | P. Sample |
| J. Elliott | T. Ferguson | S. Hollenbeck | H. Stump |
| T. Keen | | | |
| C. Larimore | | | |
| C. Solberg | | | |
| R. Sterling | | | |
| C. West | | | |
| <i>Commission Members Absent</i> | <i>Ex-officios Present</i> | | |
| M. Adkins | W. Rohrer | G. Llewellyn | |
| A. Johnson | M. Cooke | | |
| J. Manchester | | | |
| B. O'Neill | | | |
| W. Vanderwende | | | |

This meeting was properly notified and posted as required by law.

Call to Order/Welcome:

Vice Chairman David Baker called the meeting to order at 7:00 p.m. and welcomed everyone in attendance.

Approval of Minutes:

J. Elliott motioned to accept the minutes of the August 14, 2007 Full Commission Meeting.

C. Larimore seconded the motion, which passed unanimously.

Discussion and Action Items:

Review and Act on May 18, 2007 Formal Complaint and August 6 Hearing Recommendations:

Prior to any discussion, D. Baker recused himself from this matter as he acted as the Hearing Officer, and appointed C. Larimore Chair for this segment of the meeting. C. West also recused himself as he conducts business with the alleged violator. M. Cooke stated that in the absence of Baker and West, the Commission does not have a quorum and therefore, the item cannot be acted upon at this meeting. She suggested that action be tabled until next month, or at least until later in the evening to see if any other members of the Commission come forward.

D. Baker called the meeting back to order, explaining that the Commission would continue with the agenda. He noted that if another Commission member comes in later, they will return to the previous agenda item. As no additional members arrived late, this matter will be placed on the October 9, 2007 agenda for action.

Review and Act on Fine Matrix for Nutrient Management Violations:

D. Baker asked B. Rohrer to explain the Matrix (See copy attached to these minutes). He explained that DNMP staff looked at Pesticide and DNREC penalty systems, combining and molding them around DNMP business. He

went on to explain that the document provides structure for penalties and also provides a system in order to better organize them:

- Seven different elements go into the decision making process
- There is a commercial category as well as a private category for fine structure, with different revenue levels assigned to each
- There are three levels of violations, which are determined by using the seven elements given
- Fines or penalties are capped at \$1,000, with any higher amount being heard through a judge
- Penalties can be assessed for each violation

Clarification of the word “violation” as it pertains to this matrix was requested and M. Cooke stated that she thinks that will be dependent on the circumstances:

- There could be violations which occur on multiple days across time...depending on the circumstances, the individual could be assessed multiple violations
- Or, it could be that given the circumstances, it would make more sense to consider them as a single violation, even though they may have existed over time
- The Committee would need to be considerate of the nature of the violation, when the individual was informed of the violation, and whether or not it would get anything from the individual to address it. The Commission would then use the Hearing Officer process, and that is one of the issues that the Hearing Officer will have to address. And then, when the Officer’s decision comes to the Commission, they will be given the opportunity to agree or disagree with that decision.

C. Solberg expressed his concern that folks who took reasonable actions are treated with more graciousness and respect than the actor who’s uncooperative. M. Cooke answered that she thinks it goes to the nature and circumstance of the violation, which is element one. It can also be taken as to the extent and gravity of the violation, which is element two. Degree of culpability, element 5, can also be applied. There is not a single factor to address the concern, but a number of elements come into play. She explained that in the past, with the few complaints that have come forward, that one thing has been taken into consideration and has moved forward to a hearing officer and by this Commission. There was a question about whether \$1,000 cap is per violation or total of multiple violations. There was a discussion, and it was decided that it is dependent on how the violation is defined, how many violations are found, and the discretion of the Commission. Although there is a \$10,000 limit according to Nutrient Management Law, anything over \$1,000 must be heard by JP Court. B. Rohrer makes the initial assessment, determines the level of violation and then makes a recommendation to the Commission.

M. Cooke explained the hearing process, (adding that the time frame is not inconsistent with other administrative agencies that impose administrative penalties and fines):

- The DNMP receives a complaint and verifies that there is a violation
- The violator is given at least ten days, but no more than 21 days notice of a hearing
- The hearing occurs approximately 3 weeks from the time a violation is verified
- The Hearing Officer’s decision is written and brought before the Commission
- The Commission recommends the decision to the Secretary of Agriculture
- The Secretary then provides a period of appeal (20 days)
- There is either a process in front of the Secretary (if appealed), or the penalty is assessed

There was discussion about imminent or immediate threats. Typically, DNREC has been engaged to help with serious violations. The priority is to go through the process, given time to do so. If there is imminent threat, an outside agency is called to deal with the violation, and penalties are ironed out later.

C. Solberg motioned to accept the recommendation of the Rules and Regulations Subcommittee for its Penalty and Fine Matrix.

J. Elliott seconded the motion, which passed unanimously.

Subcommittee Reports:

T. Keen summarized the Technology Subcommittee meeting as follows:

- Rates for Nutrient Management Plan Reimbursement:
B. Rohrer and staff will come back to the Subcommittee with a recommendation by October for the 2009 crop year. Rates for 2008 will remain the same.
- Cover Crops:

J. Manchester felt we should be asking for more money for cover crops. He put a motion on the floor, but it did not carry.

➤ **Mass Balance Report (T. Sims)**

T. Sims reviewed his Mass Balance Report, and would like any comments, deletions or omissions brought to his attention by the 15th of October.

Administrator's Report: *Refer to the attached Administrator's Report*

B. Rohrer explained the Administrator's Report.

B. Rohrer reported that he has been in contact with D. McGuigan and H. Zygmunt from Region III EPA. They would like to initiate discussions with key people that oversee CAFO implementation. This is part of the approval process for the DE CAFO Program. The following topics were mentioned for discussion:

| | | |
|------------------------------|----------------------|---------------------------|
| Applied setback requirements | Public participation | Entering an evaluation |
| Enforcement | Temporary storage | Who needs an NPDES Permit |
| Workshare Agreement | Legal structure | |

B. Rohrer stated "I see the process as ongoing and recommend Ag representation." He requested guidance: should he stand back and allow DNREC to take the lead, or should he ever be involved in the process? D. Baker asked what was meant by legal structure. B. Rohrer responded the legal authority for implementing a CAFO Program. D. Baker stated "as far as the Commission; beyond our responsibility to commit our Administrator to try and deal with these issues, EPA can come to the Commission and talk about them. We don't want to be disrespectful. But, at the same time, if they want to be up front and talk about it, we would prefer to do it that way." K. Donnelly added "they (EPA) have worked directly with Peder and Bill. They know that there are at least two topics up for discussion: outdoor storage and FOIAs. Some of the other issues relating to their inability to act to approve our CAFO program three or four years ago...I think they're aware of the sensitivity of enforcement activity, compliance inspections. I think they're trying to ratchet down who gets involved and taking it to a lower level. They want to try to have some conversations at the lower level and then there will be an opportunity to move it "up the food chain" with the Commission, with them, with DNREC." C. Larimore asked if EPA is talking about CAFOs, or all farmers? She feels that in the eyes of the EPA, every farm is a CAFO. B. Rohrer responded that the focus of EPA is CAFOs. He added that because Delaware has a State Nutrient Management program, it is much easier for Delaware (than those states without a state program) to defend its small and medium sized farmers that need to demonstrate accountability that a discharge is not occurring. C. West stated that he feels that the EPA has failed to recognize the good work that this Commission has done, that the staff has done, that the Department of Ag and DNREC have done on this issue. K. Donnelly mentioned "in the Commission's letter in May, the Commission suggested that they would reconsider talking to the EPA once the enforcement/compliance inspection issues had been resolved. They haven't been resolved yet. One individual sent a letter to EPA requesting that they consider an in-kind offer for the corrections that individual is making. The other individual has responded to the request for information. My suggestion is that we respectfully say, until these two issues are resolved, and we feel comfortable about the other inspections, we're not going to have a dialogue." D. Baker stated that it is his preference that B. Rohrer does not have the authority, nor is it his responsibility to have discussions with EPA outside of the confines of the Commission business. C. Solberg added "if EPA is going to regulate by enforcement, they are going to take their time, slowly and independently of the actions of the Commission. Their conception of time is a lot different than everybody else's." He does not feel that the Commission needs to feel too anxious about what the EPA does. He feels the "Commission should let the EPA fulfill whatever enforcement action, because if they flush out a response greater than what they had intended, they are effectively creating a regulatory response from us. The climate looks like a regulatory response when none is needed."

T. Keen questioned the length of time that lapses in between plan coverage. It was explained that outreach begins typically in late winter or early spring. He suggested that the Program notify those farmers that are due to sign a new Cost Share Application. J. Elliott agreed, adding that "as a service to the agricultural community, we should send out some type of notification." C. West clarified that there are two things that the farmer is being notified of: 1) you are due to renew your nutrient management plan for 08, and 2) there are funds available to assist you with that plan. B. Rohrer stated that a lot of farmers do notify the program. He added that the annual newsletter will be going out for crop year 08, reminding farmers of the financial help available for updating their plans, as well as funding available for relocation of litter-manure. C. West asked if the Commission still pays the University of Delaware for our educational program. B. Rohrer stated "yes, at the amount of approximately \$170,000 per year."

C. West has had a lot of requests from Sussex County poultry growers that some classes be held in Georgetown in the evening. There are a lot of growers that can't be gone entire days to attend Ag week or other classes further from their operations. B. Rohrer agreed and will convey that request to the University.

Public Comments: None

D. Baker noted that the Commission still has a vacancy from New Castle County, which was highlighted by the fact that the Commission failed to make quorum on an agenda item this evening. The Commission is now talking about the EPA, BMPs, production areas, and other topics that weren't in the works when the Commission was created. Since the program is now almost fully implemented, meetings are not so consumed with cutting edge issues anymore. He would like to propose that the Planning Subcommittee take time over the winter and through the spring to look at or assemble a number of issues that Commission should examine, such as: filling the vacancy, changes that may need to be made to regulations, any administrative changes, etc.

The New Castle County Commission member is appointed by the House and represents the poultry industry.

K. Donnelly mentioned that a meeting will take September 27 regarding BMPs for the production area. DNREC, NRCS, Nutrient Management and others will be in attendance.

Next Meeting: The next scheduled meeting will be October 09, 2007 at 7:00 p.m.

Adjournment: Vice-Chairman Baker adjourned the meeting at 8:30 p.m.

Approved,

D. Baker, Vice-Chair
Delaware Nutrient Management Commission

BRR/psd